No. 11982.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. F. SMITH,

Appellant,

vs.

JIM DANDY MARKETS, INC., FIREMAN'S FUND INSURANCE COMPANY, CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellees,

and

CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellants,

vs.

JIM DANDY MARKETS, INC.,

Appellee.

REPLY BRIEF OF APPELLEE, JIM DANDY MARKETS, INC. TO APPELLANT SMITH'S OPENING BRIEF.

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REPLY BRIEF OF APPELLEE, JIM DANDY MARKETS, INC. TO APPELLANT SMITH'S OPENING BRIEF.

A.

STATEMENT OF THE CASE

On the 29th day of September, 1941, Charles Kindig and wife, as lessors, entered into a lease with appellant Smith upon certain real property situated in the City of Bell, hereinafter referred to as "ATLANTIC STORE" [R. 56

to 60]. Said lease was for the term of five years from the 1st day of August, 1942 to the 1st day of August, 1947, and granted Smith an option to extend the term from August 1, 1947, to August 1, 1952.

Paragraph Five of the Kindig lease contains the following:

> "It is understood that the improvements now on the premises are the property of the Lessee, and it is agreed by the Lessor that these, and all other improvements placed on the said property during the term of this Lease by the Lessee shall belong to the Lessee, and may be removed by him at the expiration of said term."

Paragraph Eight of the Kindig lease reads as follows:

> "The expressions, terms, conditions, requirements and obligations of this Lease are binding upon, and shall inure to the benefit of the parties hereto, their heirs, administrators and successors in interest, and shall be construed covenants running with the land."

On the 1st day of February, 1942, Thomas A. McLenaghan, as Administrator of the Estate of E. T. Williams, deceased, as lessor, entered into a lease with appellant Smith as lessee, upon certain real property situated in the City of Bell [R. 60 to 64], and the property described in said lease will likewise be referred to as the "ATLANTIC STORE," by virtue of the fact that the two parcels of property described in the above leases adjoin each other.

The McLenaghan lease was for five years, commencing on the 1st day of August, 1942, and ending on the 1st day of August, 1947. The lease contains the following provision:

> "It is understood that the improvements now on the premises are the property of, and belong to the

Lessee, and it is agreed by the Lessor that these, and all other improvments placed on the said premises by the Lessee during the term of this Lease, or any extension of said Lease, shall belong to the said Lessee and may be removed by him at the expiration of the term."

The lease likewise contains a provision giving Smith an option to extend the lease for four years and six months, to-wit: from August 1, 1947 to February 1, 1952.

The McLenaghan lease also contains the following provision:

"The expressions, terms, conditions and obligations of this Lease are binding upon, and shall inure to the benefit of the parties hereto, their heirs, administrators and successors in interest, and shall be construed covenants running with the land."

On the 1st day of July, 1945, and for some time prior thereto, Charles Schuster, Leo A. Goldberg, Max M. Berick, Earl I. Swetow and Norman Schuster were co-partners, doing business under the firm name and style of "Jim Dandy Markets," and on the 1st day of July, 1945, Jim Dandy Markets entered into an agreement with appellant Smith [R. 27 to 40]. For the convenience of the Court an analysis of said agreement follows:

"RECITALS.

Smith is the owner of eight stores, four of which he owns outright, and four of which he leases. He owns the merchandise and all fixtures and equipment, including office equipment, and Jim Dandy desires to

lease the same from Smith for ten years. The four buildings he owns are known as:

A. Central Avenue Store
B. Figueroa Street Store
C. Nowalk Store
D. Western Avenue Store

which store buildings Jim Dandy desires to lease for ten years from July 1, 1945, and Smith is willing to lease said stores for said period.

The stores held under lease by Smith are known as:

A. Watts Store
B. Atlantic Store
C. Ontario Store
D. Sixth Street Store

and Smith is desirous of sub-leasing them to Jim Dandy, but the leases do not run for a full ten years, and Jim Dandy will sub-lease the stores from Smith for the balance of the terms, including the term referred to in options in said leases.

Smith has a lease on the lot adjacent to the Figueroa Street Store for parking automobiles, which lease expires on May 31, 1947, and Jim Dandy wants this lease.

Smith is the owner of certain licenses, and is desirous of transferring the licenses to Jim Dandy.

Smith is the owner of 7 trucks and 4 trailers which Jim Dandy wants to buy.

Jim Dandy, as additional consideration, and as security for the performance of the Agreement, and of the payment of the rent on the leases, shall make an advance payment to Smith of $50,000.00, as evidence of good faith.

Jim Dandy is desirous of securing an option for the purchase of the fixtures and equipment in the markets at the expiration of ten years, and Smith is willing to give the option.

Jim Dandy wants to buy, and Smith is willing to sell the goodwill of his business.

"Agreement Provisions.

1. Smith agrees to sell all saleable merchandise in the 8 stores through an escrow to be started with Haas Baruch & Co., the purchase price to be paid into the escrow, and the purchaser can do business under the name of E. F. Smith Public Markets, or under the trade name of the purchaser.

2. Smith is to transfer ration points or ration credits to Jim Dandy.

3. Smith leases to Jim Dandy all store fixtures and equipment, including office equipment owned by him for a period of ten years, at a rental of $1,400.00 per month. Title to the fixtures is to remain in Smith.

4. Smith agrees to enter into a 10-year Lease from July 1, 1945, for the following stores owned by him:

A.	Central Avenue Store	$550.00 per month
B.	Figueroa Store	$400.00 per month
C.	Norwalk Store	$200.00 per month
D.	Western Avenue Store	$650.00 per month

Certain concessions in the stores are under lease, or under a month to month tenancy, and will be assigned to Jim Dandy.

5. Smith agrees to sub-lease to Jim Dandy, stores known as:

1. Watts Store
2. Atlantic Store
3. Ontario Store
4. Sixth Street Store

for 10 years, provided Smith is able to, upon the expiration of his Leases on said stores, re-lease at a rental not in excess of the present rental, but if the rent is higher, he will not take new leases unless it is satisfactory to Jim Dandy.

6. The parties understand that the Leases Smith has on the 4 stores expire prior to June 30, 1955. If Smith gets extensions, he must give such extensions to Jim Dandy. If Smith cannot get extensions, there shall be a reduction in the monthly rental to be paid by Jim Dandy for the fixtures, as follows:

A. Watts Store. Rental on Sub-Lease shall be reduced by $500.00 per month, and the rent on the fixtures and equipment shall be reduced by $200.00 per month.

B. Atlantic Store. Rental on the Sub-Lease shall be reduced by $320.00 per month, and the rent on the fixtures and equipment shall be reduced by $200.00 per month.

C. Ontario Store. Rental on Sub-Lease shall be reduced by $205.00 per month, and the rent on the fixtures and equipment shall be reduced $200.00 per month.

D. Sixth Street Store. Rental on the Sub-Lease shall be reduced by $600.00 per month, and the rent on the fixtures and equipment shall be reduced $150.00 per month.

7. In the event the Leases cannot be extended, or new leases secured, Smith can sell the fixtures in such stores, and the option price hereafter granted shall be reduced in proportion, said reductions to be mutually agreed upon.

8. In the event any and all of the leases cannot be renewed, or new leases secured by Smith, Jim Dandy shall not take leases in their own name.

9. There is a parking lot adjoining the Figueroa Store, which will be assigned to Jim Dandy.

10. Smith will assign to Jim Dandy all licenses issued to him.

11. Smith agrees to sell 7 trucks and 4 trailers, and Jim Dandy will pay $7,500.00 for them.

12. As security Jim Dandy will pay to Smith $50,000.00, to be applied upon the last year's rental. If they faithfully carry out the agreement, Smith will pay 6% interest on the $50,000.00.

13. Smith gives Jim Dandy the option to buy the fixtures and equpiment in all of the stores for $192,-500.00 cash. The option cannot be exercised until the expiration of 10 years. Jim Dandy must give 90 days notice before the expiration of 10 years, that it wants to exercise the option.

14. Jim Dandy is not to assign any of the Leases or subleases without the consent of Smith.

15. Smith agrees to furnish Jim Dandy with any records relative to the purchase of merchandise, and other records, and agrees not to engage in business in the County of Los Angeles, or in the City of Ontario, during the term of the Contract.

16. Smith is to pay all taxes against the fixtures, and is to keep them insured at his own expense."

On or about the 1st day of July, 1945, appellant Smith, as sub-lessor and Jim Dandy Markets, as sub-lessee, entered into a sub-lease for said "ATLANTIC STORE" [R. 195 to 203].

At 7:00 A. M. on July 5, 1945, Jim Dandy Markets went into possession of all the stores mentioned in the above leases, and into possession of the buildings, fixtures, equipment and merchandise in said stores, including the "ATLANTIC STORE."

On July 5, 1945, the appellee Fireman's Fund Insurance Company, hereinafter referred to as "Fireman's Fund," issued its policy of fire insurance, No. A-959495, under which appellant Smith was named as the insured, and said policy covers, among other properties, the "ATLANTIC STORE."

Thereafter, while Jim Dandy Markets was in possession of the "ATLANTIC STORE," including the building and fixtures therein and thereon, a "SUPPLEMENTARY AND MODIFIED AGREEMENT" was, on the 12th day of June, 1946, entered into between Smith and Jim Dandy Markets [R. 65 to 73]. For the convenience of the Court an analysis of the Agreement follows:

"RECITALS.

The parties desire to amend the Agreement of July 1, 1945.

AGREEMENT PROVISIONS.

1. Smith agrees to sell to Jim Dandy, all fixtures, machinery and equipment in the 8 markets, for the sum of $225,000.00, and, that of the $50,000.00 deposited under the July 1, 1945 Agreement, $30,000.00 thereof shall be applied on the $225,000.00,

and the balance of $195,000.00 shall be paid in installments of $5,000.00, or more, commencing on August 1, 1946, together with 6% interest, payable monthly.

2. The $20,000.00 remaining of the $50,000.00 shall be held by Smith as security for the performance by Jim Dandy of the leases on the following 4 markets:

1. Central Avenue
2. Western Avenue
3. Figueroa Street
4. Norwalk

and if Jim Dandy complies with the terms of the leases, Smith will retain the $20,000.00 and give Jim Dandy free rental during the last 11 months of the Lease on the Central Avenue Market, Western Avenue Market and Figueroa Street Market, and 12 months free rental on the Norwalk Market, and Smith is to pay interest at 6% on the $20,000.00, commencing July 1, 1946, and payable annually commencing July 1, 1947.

3. Concurrently with the signing of the "SUPPLEMENTARY AND MODIFIED AGREEMENT," an escrow shall be opened and Smith will deposit the following:

a. Separate Bill of Sale to the fixtures, machinery and equipment located in the 8 markets.

b. Bill of Sale covering all office furniture, fixtures and equipment in the 8 markets.

c. Smith will deposit in the escrow, the original leases upon the following markets:

Ontario	Watts
Atlantic	Sixth Street

together with a written assignment of each of said leases in favor of Jim Dandy, where such assignment is permitted. Where written consent to assignment is required, Smith will deliver such assignment if permission is secured, but if permission to assign cannot be obtained, then any existing sub-leases on such markets between Smith and Jim Dandy shall remain in force and effect, but Jim Dandy shall have the right to assign the sub-leases when it has deposited in escrow the money required by Paragraph 4 of the amended agreement.

The Lease in existence upon the fixtures, machinery and equipment between Smith and Jim Dandy, shall be cancelled as of the 1st day of July, 1946, and all rental shall cease as of said date.

With reference to the Leases and the assignments thereof to be deposited in escrow by Smith, the sub-leases shall be deemed cancelled and terminated as of the date of delivery from escrow of the Leases and Assignments, as provided in Paragraph 4, and Jim Dandy shall be released from any and all liability from and after said date.

4. When Jim Dandy has deposited in escrow the sum of $195,000.00, its obligation under this Agreement shall be terminated, and all leases, sub-leases, assignments and bills of sale remaining in the escrow shall be delivered to Jim Dandy.

The escrow instructions shall provide that the Bill of Sale, as well as the leases and assignments thereof as to any particular market, shall be delivered to Jim

Dandy when Jim Dandy has paid the following amounts:

Western Avenue	$39,975.00	20½%
Ontario	28,275.00	14½%
Sixth Street	27,300.00	14 %
Atlantic Blvd.	27,300.00	14 %
Central Avenue	23,400.00	12 %
Watts	19,500.00	10 %
Figueroa Street	14,625.00	7½%
Norwalk	14,625.00	7½%

Smith shall have the right to withdraw money from the escrow deposited by Jim Dandy, subject only to any claims that are made against the fund, and provided Smith has deposited in escrow the Bills of Sale, Leases and Assignments.

Jim Dandy shall not have the right to obtain from the escrow, the Bill of Sale pertaining to the office furniture, fixtures and equipment until the entire purchase price is paid.

If claims are presented in the escrow against Smith, Smith shall pay such claims before the close of escrow.

5. As to any leases assigned by Smith to Jim Dandy, Jim Dandy agrees to indemnify and hold Smith harmless from any liability which may or might accrue under said leases subsequent to the assignment.

6. As to the markets owned by Smith, to-wit:

1. Central Avenue
2. Western
3. Figueroa Street
4. Norwalk

Smith agrees that Jim Dandy may, without obtaining Smith's permission, sublease any or all of said markets, or assign the leases, and the assignee shall,

in writing, assume and agree to be bound by the terms of the Lease, and a copy of the assignment and assumption shall be delivered to Smith, and Jim Dandy thenceforth shall not be liable under such leases.

In view of the fact that the lease on the said 4 markets is evidenced by one instrument, Smith will, upon the request of Jim Dandy, execute and deliver individual leases upon the several markets sites in order to make convenient the sub-leasing of the market involved, or the assignment of said lease or leases, and said individual leases shall be upon the exact terms and conditions contained in the one instrument, except as to payment of rent for fixtures, machinery and equipment, and the deposit of the $20,000.00 as security for the performance of the terms, conditions and covenants of the lease, and the giving to Jim Dandy of free rental during the last 11 months on the leases on the Central Avenue, Western and Figueroa Street Stores, and the last 12 months free rental on the Norwalk Market, and except as to any other matter contained therein which is inconsistent with the provisions of this agreement.

7. Jim Dandy will, at its expense, on and after July 1, 1946, keep the fixtures, machinery and equipment fully insured, with loss payable to Smith, until the full purchase price has been paid, and will, during the said period, pay all personal property taxes levied against said fixtures, machinery and office equipment.

8. Smith shall have no concern in connection with the obtaining of a renewal or extension of any of the leases in which he is named as Lessee, and which are being assigned by Smith to Jim Dandy concurrently

herewith; the sole responsibility for taking such action shall be with Jim Dandy.

9. Except as so amended or modified, the prior agreement shall remain in force and effect."

On the 19th of July, 1946, appellant, Central Manufacturers Mutual Insurance Company, hereinafter referred to as "Central Insurance Company," issued its policy No. F-321452 in the sum of $12,500.00 upon the "ATLANTIC STORE," under which policy Jim Dandy Markets, a partnership, was named as the insured. The policy has a "Loss Payable Clause" dated July 19, 1946.

Thereafter, there was an endorsement placed on the policy which is dated July 19, 1946, which endorsement contained the following:

"Loss Payable Clause #346 in favor of E. F. Smith attached in error, and is hereby deleted from policy.

"Loss, if any, to be adjusted with and payable to the named insured."

On or about the 19th day of July, 1946, appellant, Indiana Lumbermen's Mutual Insurance Company, hereinafter referred to as "Lumbermen's Insurance Company," issued its policy No. 3170 in the sum of $12,500.00 upon said "ATLANTIC STORE," under which policy Jim Dandy Markets was named as the insured. The policy has a "Loss Payable Clause" dated July 19, 1946.

There was an endorsement on the policy, and said endorsement contained the following:

"Loss Payable Clause #346 in favor of E. F. Smith attached in error, and is hereby deleted.

"Loss, if any, to be adjusted with and payable to the named insured."

Both policies issued by plaintiff appellants permit other insurance.

Concurrently with the execution of the "SUPPLEMENTARY AND MODIFIED AGREEMENT" between Smith and Jim Dandy Markets, Smith and Jim Dandy Markets executed and delivered to the Morrison Escrow Company, Escrow instructions consisting of two pages, and additional Escrow instructions consisting of one page [R. 74 to 84].

Concurrently with the execution and delivery of the "SUPPLEMENTARY AND MODIFIED AGREEMENT," and with the execution and delivery of said "ESCROW INSTRUCTIONS," Smith delivered to the Escrow Holder each and all of the documents required of him to be delivered, and each and all of the following documents relating to the "ATLANTIC STORE":

(a) Lease dated September 29, 1941 between E. F. Smith and Charles Kindig and Daisy Kindig [R. 56 to 60].

(b) Lease dated February 1, 1942, between E. F. Smith and Thomas A. McLenaghan [R. 60 to 64].

(c) Bill of Sale dated June 27, 1946, executed by E. F. Smith [R. 84 to 86].

(d) Assignment of Lease dated June 27, 1946, executed by E. F. Smith [R. 86 to 88].

The building known as the "ATLANTIC STORE," and described in the policies issued by plaintiffs and appellants, was totally destroyed by fire on January 14, 1947, and at that time all rights of the partnership known as Jim Dandy Markets in and to said store and said building, had been succeeded to by Jim Dandy Markets, Inc., by

virtue of an agreement dated October 5, 1946 (conceded by all parties).

All payments due Smith from Jim Dandy Markets under the "SUPPLEMENTARY AND MODIFIED AGREEMENT," and under the "ESCROW INSTRUCTIONS" up to and including the date of the fire, had been paid and were not in default, and on the 19th of March, 1947, all payments required to be made under said "SUPPLEMENTARY AND MODIFIED AGREEMENT" and said "ESCROW INSTRUCTIONS" as relating to the "ATLANTIC STORE" were paid in full to the appellant Smith, and the Morrison Escrow Company delivered to appellee Jim Dandy Markets, Inc., the following documents:

1. Lease dated February 1, 1942 between McLenaghan and Smith [R. 60 to 64].
2. Lease dated September 29, 1941 between Kindig and Smith [R. 56 to 60].
3. Bill of Sale dated June 27, 1946, executed by E. F. Smith [R. 84 to 86].
4. Assignment of Lease dated June 27, 1946, executed by E. F. Smith [R. 86 to 88].

On July 30, 1947, the full sum of $225,000.00 required to be paid to Smith under the "SUPPLEMENTARY AND MODIFIED AGREEMENT" and under the "ESCROW INSTRUCTIONS" was paid, and Morrison Escrow Company delivered to appellee, Jim Dandy Markets, Inc., all papers and documents required of said Morrison Escrow Company to be delivered by said "SUPPLEMENTARY AND MODIFIED AGREEMENT" and said "ESCROW INSTRUCTIONS."

The cash sum value of the building destroyed by fire on January 14, 1947, is the sum of $32,476.92, and Jim

Dandy Markets, Inc., did and performed everything required of it to be done and performed under the policies of plaintiffs herein, and plaintiffs have paid nothing under said policies, although appellee Jim Dandy Markets, Inc., has made demand of plaintiffs for the payment thereof.

The policy issued by appellee Central Insurance Company to appellee Jim Dandy Markets, Inc., contains the following provisions, to-wit:

> (a) It is understood and agreed that the property insured hereunder stands on leased ground, lease expiring 6-30-55.
>
> (b) Matters avoiding policy. This policy shall be void (b) if the interest of the insured be other than unconditional and sole ownership.
>
> (c) Apportionment of loss. This Company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by, and expenses of, removal from the premises endangered by fire, than the amount hereby insured bears to the entire insurance covering such property whether valid or not, or by solvent or insolvent insurers.

The policy issued by appellee Lumbermen's Insurance Company to appellee Jim Dandy Markets, Inc., contains the following provisions, to-wit:

> (a) It is understood and agreed that the property insured hereunder stands on leased ground, lease expiring June 30, 1955.
>
> (b) Matters avoiding policy. This policy shall be void (b) if the interest of the insured be other than unconditional and sole ownership.

(c) Apportionment of Loss. This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by, and expenses of, removal from the premises endangered by fire, than the amount hereby insured bears to the entire insurance covering such property whether valid or not, or by solvent or insolvent insurers.

The policy issued by Fireman's Fund contains the following provisions:

(a) Matters avoiding policy. This entire policy shall be void (b) if the interest of the insured be other than unconditional and sole ownership.

(b) Matters suspending insurance. Unless otherwise provided by agreement endorsed hereon or added hereto, this company shall not be liable for loss or damage occurring (g) while the interest in, title to, or possession of the subject of insurance is changed excepting:—(2) a change of occupancy of building without material increase of hazard.

(c) Apportionment Clause. This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by, and expenses of, removal from the premises endangered by fire, than the amount hereby insured bears to the entire insurance covering said property whether valid or not, or by solvent or insolvent insurers.

(d) Ownership Clause. It is understood and agreed * * * that changes may take place in the interest, title or possession of the subject of insurance whether by legal process or judgment or by voluntary act of the Insured, provided this company consents thereto in writing within sixty (60) days next following date of such change.

ARGUMENT.

POINT I.

The Assignment of Lease Did Convey to Jim Dandy Markets, All Rights That Smith Had in the Leases Assigned, Including the Building.

The assignment delivered in escrow of the "ATLANTIC STORE" is in the usual form used by lawyers assigning leases without reservations. The assignment does not except therefrom the building, and in the absence of such an exception the assignment carries with it all rights that the assignor had, including the right to the building and the right to remove the same. If all that Smith intended to assign was the "bare land," then why did he not impose a condition requiring Jim Dandy to pay rent for the use of the building, particularly in view of the fact that under the option contained in the Leases, Jim Dandy would be entitled to use the building until August 1, 1952. Additionally, we pose the question whether any reasonable man would take an assignment of a lease upon "bare land" when the land without the building was of no value to him.

In *Methodist Episcopal Church v. Seitz*, 74 Cal. 287, 15 Pac. 839, the Court said:

> "This is an action to recover $6,213 upon a contract of sale contained in a lease. The defendant was the owner of a lot of land, and one William Perkins was the owner of certain buildings upon it. This being the situation of the parties, they entered into a contract by which defendant leased the land to Per-

kins at a rental of $120 per month, and which contained a provision that the buildings should stand as security for the rent, and that at the expiration of the term Perkins should have the option either to remove the buildings, or to require defendant to take them at a valuation 'to be ascertained by two persons, one to be chosen by each party; and in case the persons so chosen disagree, those two shall choose an umpire, whose decision shall be final and binding on the parties hereto and their legal representatives.'

Afterward, Perkins, with the consent of the defendant, executed the following paper: 'For value received, I hereby sell and assign all my right, title and interest in and to the within lease to the California Annual Conference of the Methodist Episcopal Church.'

At the expiration of the term plaintiff and defendant each selected a person to ascertain the value of the buildings; and they (not being able to agree) selected an 'umpire' who decided that the value was $6,213. Defendant refusing to pay, the plaintiff brought this action for the amount. The court below gave judgment for the plaintiff, and the defendant appeals.

1. The point is made that the assignment was not sufficient to pass the right to the contract of purchase. The argument is, that the rght of purchase was a distinct thing from the 'lease'; that the title to the buildings was in Perkins; that he did not lease his own property for himself, but only the land of the defendant; and that the assignment was only of

'the within lease,' no words of conveyance of the building being used; that therefore the title is still in Perkins, and the plaintiff has nothing to sell.

This argument is exceedingly plausible, but we do not think it is sound. The parties to the assignment certainly supposed they were transferring the lessee's right in relation to the buildings; for it does not appear the land had any use as distinct from the buildings. A town lot covered with buildings could not well have such distinct use as long as the buildings remained upon it, which, in this case, was to be until the expiration of the lease. But if the ownership of the buildings remained in the assignor, the right to use them would remain in him also; and upon this theory the assignee contracted for a barren right." (Italics ours.)

In *Bewick v. Mecham,* 26 Cal. 2d 92, 156 P. 2d 757, Lopez leased real property to Lombard for the operation of a service station. The lease authorized the lessee to make improvements, and gave the lessee the right to buy the property upon certain conditions. Lombard, the lessee, assigned his interest to plaintiff in the "indenture of lease," to which assignment the lessor consented. When the plaintiff exercised his option to purchase the land at the end of the term, the lessor refused to sell, contending that the assignment of the lease did not carry with it the right to exercise the option to purchase. The Court said:

"Defendant contends that the assignment of the lease by Lombard to plaintiff did not carry with it the option to purchase the land. The assignment named

as its subject matter 'the indenture of lease.' 'The assignment of the writings by which a contract is witnessed is the most common mode of transferring the contract, and cannot be understood as having any other intention.' (Blakeman v. Miller, 136 Cal. 138, 141 (68 P. 587, 89 Am. St. Rep. 120).) Moreover, an option to purchase the land during, or at the end of the term, operates to the benefit of the Lessee as such, for he may erect buildings or other structures without losing their use at the end of the term, and it is therefore settled in this state that 'an option covenant contained in a lease is a real covenant running with the land.' (Chapman v. Great Western Gypsum Co., 216 Cal. 420, 425 (14 P. 2d 758, 85 A. L. R. 917); See Laffan v. Naglee, 9 Cal. 662, 678 (70 Am. Dec. 678); Hall v. Center, 40 Cal. 63; Standard Oil Co. v. Slye, 164 Cal. 435, 442 (129 P. 589); 15 Cal. L. Rev. 56; 2 Tiffany, Landlord and Tenant, par. 267.) The separate reference in the agreement to the lessor's consent to an assignment of the option right prevented the Lessee from claiming that he could assign the option to purchase without the lease. (See Mott v. Cline, 200 Cal. 434, 450 (253 P. 718); 15 Cal. L. Rev. 56.)"

See, also:

Wong v. Stuyvesant Insurance Co., 100 Cal. App. 109, 279 Pac. 1050.

POINT II.

The Assignment Should Not Be Reformed as There Is No Showing of Any Ground for Reformation.

The Civil Code of California provides as follows:

> "Section 3399, Civil Code. WHEN CONTRACT MAY BE REVISED. When, *through fraud,* or a *mutual mistake of the parties,* or *a mistake of one party, which the other at the time knew or suspected,* a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.
>
> "Section 3400, Civil Code. PRESUMPTION AS TO INTENT OF PARTIES. For the purpose of revising a contract, it must be presumed that all the parties thereto intended to make an equitable and conscientious agreement.
>
> "Section 3401, Civil Code. PRINCIPLES OF REVISION. In revising a written instrument, the Court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be."

The evidence in this case does not show that the assignment sought to be reformed was executed as the result of (a) fraud; (b) mutual mistake of the parties; (c) a mistake of one party which the other at the time knew or suspected.

The "SUPPLEMENTARY AND MODIFIED AGREEMENT" as well as the "ESCROW INSTRUCTIONS" provided for "Assignment of Leases," and there is nothing in the testimony of appellant Smith, his lawyer, Thomas B. Cassidy, or

his agent, James R. Johnston, from which the Court could find that any fraud was practiced by Jim Dandy Markets upon appellant Smith, or that there was a mutual mistake, or that there was a mistake upon the part of Smith that was known to Jim Dandy. It is undisputed that Jim Dandy, after the execution of the assignment, acted in accordance with the implication of a leasehold assignment, to-wit, insuring the building and paying for the fire insurance policies which are the basis of its claim against its insurance carriers. If Jim Dandy did not conscientiously and honestly believe that the assignment of the lease carried with it Smith's right to the building, it would be unreasonable to assume that Jim Dandy would pay $550.00 premiums for the policies issued to it, and it would likewise be unreasonable to assume that although the Agreement dated July 1, 1945 [R. 27 to 40] gave Jim Dandy an option to be exercised ten years hence to buy fixtures and equipment described in the Agreement dated July 1, 1945 for the sum of $192,500.00, Jim Dandy would, on June 12, 1946, enter into an agreement with Smith [R. 65 to 73] under which Jim Dandy agreed to pay Smith $225,000.00, as provided in said "SUPPLEMENTARY AND MODIFIED AGREEMENT" unless Jim Dandy was getting more from Smith under the "SUPPLEMENTARY AND MODIFIED AGREEMENT" than it was getting under the agreement dated July 1, 1945. It is significant to note that under the agreement dated June 12, 1946 (approximately 11½ months after the July 1, 1945 Contract) Jim Dandy unequivocally agreed to pay Smith $225,000.00, $30,000.00 thereof immediately by credit of the $50,000.00 deposited under the July 1, 1945 Agreement, and $5,000.00 per month, plus 6% interest, commencing August 1, 1946 on the unpaid balance, the result being that

taking Smith's valuation of money, 6%, under the June 12, 1946 contract, he would receive $225,000.00 as against $192,500.00 ten years hence, plus 6% interest which, for approximately a nine-year period, is equivalent in round figures to $121,500.00 additional.

See opinion of Judge Yankwich in the case at bar, 77 Fed. Supp. 171.

The cases are legion to the effect that a mistake of one party not known or suspected by the other cannot be reformed nor can unilateral mistakes be reformed.

In *Meyerstein v. Burke,* 193 Cal. 105, 222 Pac. 810, plaintiff brought an action against the defendant to obtain a judgment reforming a contract alleged to have been executed through the mistake of the parties. The contract in question is an executory contract for the purchase and sale of a house and lot, it being the theory of the plaintiff that he sold the property to defendant for $7,000.00, and interest on unpaid installments at 6%, payable $1,000.00 in cash and the balance at the rate of $50.00 per month. On the other hand, it was the theory of the defendant that he purchased the house and lot from the plaintiff for both the principal and interest totalling $7,000.00, payable $1,000.00 cash and the balance at the rate of $50.00 per month.

The Court found in favor of the plaintiff, and the Supreme Court held that the contract may not be reformed where there was a mistake by one party that was not known or suspected by the other, and said on page 108:

> "Moreover, if the finding of the trial court had been made in the identical language of the complaint, and the finding had been made in favor of the plaintiff, that fact alone would have been of no assistance

to the plaintiff. The trial court found that no mutual mistake was made and that any mistake made by the plaintiff was neither known to, nor suspected by, the defendant. Under these circumstances a failure to find on the issue in question was not a reversible error. (Gates v. McLean, 70 Cal. 42, 46 (11 Pac. 489).)"

In *Harding v. Robinson,* 175 Cal. 534, 166 Pac. 808, the Court said on page 541:

"Such a mistake, to justify the modification of a contract, cannot be established by a party who has accepted and acted upon a written contract by a mere showing that he thought the contract expressed something other than that which its plain terms denote. He must show in addition to that the mutuality of the mistake, that the minds of the contracting parties met, that they agreed upon a certain thing which was to have been embodied in their contract, and that by a mistake it was either fraudulently or inadvertently omitted or clumsily and ambiguously expressed. To the necessity of pleading a mistake it is sufficient to refer, from the multitude, to such cases as Pierson v. McCahill, 21 Cal. 123; Murray v. Dake, 46 Cal. 645; Harrison v. McCormick, 89 Cal. 327 (23 Am. St. Rep. 469, 26 Pac. 830); Bradbury v. Higginson, 167 Cal. 553 (140 Pac. 254); Carr v. King, 24 Cal. App. 714, (142 Pac. 131); 17 Cyc. 703. Respondents' reliance upon Hoffman v. Kirby, 136 Cal. 26 (68 Pac. 321), as a justification for the admission of this parol evidence, is entirely misplaced. In Hoffman v. Kirby, there was a formal complaint based upon fraud and deceit under which a reformation of the contract was sought. That such a mistake, to justify relief because of it, must be mutual,

as this manifestly is not, is recognized by all authorities. (Allen v. Hammond, 11 Pet. 63 (9 L. Ed. 633); Thompson v. Jackson, 3 Rand. (Va.) 504 (15 Am. Dec. 721); Carr v. Callaghan, 3 Litt. (Ky.) 365; Glassell v. Thomas, 3 Leigh (Va.) 113; Chamberlaine v. Marsh, 6 Munf. (Va.) 283.)"

See, also:

Miller v. Lantz, 9 Cal. 2d 544, 71 P. 2d 585;

Moore v. Vandermast, 19 Cal. 2d 94, 119 P. 2d 129;

Goodfellow v. Barritt, 130 Cal. App. 548, 20 P. 2d 740;

California Trust Company v. Cohn, 9 Cal. App. 2d 33, 48 P. 2d 744.

Conclusion.

It is therefore respectfully submitted that under the assignment executed by Smith to Jim Dandy, Jim Dandy acquired all rights that Smith theretofore had, including the ownership of the building and the right to remove the same, and that no legal cause was shown by Smith for reformation of the assignment.

Respectfully submitted,

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